SUPREME COURT, U. S.
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No. 78-1178

In the Supreme Court of the United States

OCTOBER TERM, 1978

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

-vs-

JACKSONVILLE SHIPYARDS, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOHN E. HOUSER, ESQUIRE
Attorney for Respondents
740 Florida National Bank Bldg.
Jacksonville, Florida 32202

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The respondents, Jacksonville Shipyards, Inc., et al., respectfully request that this Court deny the petition for writ of certiorari, seeking relief of the Fifth Circuit's opinion in this case. That opinion is reported at 575 F.2d 79.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Director, Office of Workers' Compensation Programs, Has No Standing to Petition for Writ of Certiorari in This Court.

The relevant portions of the Longshoremen and Harbor Workers Compensation Act, 33 USC 921, provided:

> (b)(1) There is hereby established a Benefits Review Board which shall be composed of three members appointed by the Secretary from individuals who are especially qualified to serve on such Board. ***
>
> (3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by *any party in interest*[1] from decisions with respect to claims of employees under this Act and the extensions therefore. ***
>
> (c) Any person *adversely affected or aggrieved* by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. ***

This arose as a dispute between a claimant and his employer and that employer's insurance carrier. Any funds which would have been required to be paid would have been paid either by the employer or its carrier. Perdue has long since abandoned this case. He did not participate in the proceedings before the Benefits Review Board (see page 33a)[2] nor has he appeared in any subsequent proceedings. The order below (page 1a) is final as to Perdue. The Director is neither adversely affected nor adversely aggrieved by the decision below.

1 Emphasis supplied throughout.
2 References herein are to the Petitioner's Appendix.

This issue has only been faced once by a court of appeals. *Director, Office of Workers' Comp. vs. Donzi Marine,* 568 F.2d 377 (5th Cir. 1978). That case was similar to the present controversy. Napoles, an employee of Donzi Marine, sought compensation benefits which were initially ordered by the Administrative Law Judge but later denied by the Benefits Review Board. 5 BRBS 685 (1977) The Director, but not Napoles, sought review in the Court of Appeals. The Court of Appeals held the Director was not "adversely affected or aggrieved." After outlining the responsibilities to the Director (586 F.2d at 380) the Court of Appeals pointed out:

> Under the comprehensive scheme of the Act, the United States government (represented by the Secretary of Labor and his delegate, the Director) is not itself responsible for payment of any benefits to the employee claimants and hence has no direct pecuniary interest in compensation proceedings.

And further:

> The Board decision in this case imposes no added administrative burden on the Director. It creates no problem requiring increased expenditure of administrative resources. It creates no confusion requiring clarification if the Director is to carry out its responsibilities. Resolution of the coverage question would, of course, allow the Director to give more certain advice to potential claimants regarding their rights under the Act. However, the Director cannot claim to be aggrieved simply because the advice he must give is uncertain. ***
>
> In sum, the Director, has shown no interest on his part, either pecuniary or administrative, which is adversely affected by the decision of the Board in this case. Hence, he does not meet the standing requirement imposed by section 921(c) and may not, on his

> own initiative and without the company of the claimant, petition to review the Board's decision to this court. At bottom, the Director appears here to claim no more than an interest in receiving from the Board an interpretation of the Act's coverage consistent with his belief as to what that coverage should be. The mere fact of the Board has chosen not to accept the Director's view does not aggrieve the Director in any meaningful sense and, hence, cannot give him standing to appeal.

586 F.2d at 381-382.

At bar, as in *Donzi Marine,* there is no genuine controversy — only a request for an advisory opinion.

II. *There Is No Conflict Between the decision Below and the Other Cases Relied Upon by the Petitioner and the Employee Was Not at the Time of Injury Within an Area Covered by the Act.*

This is a case of first impression. No Court of Appeal, save the one below, has considered the term "situs" except within a designated area for maritime work - and an area which has a "functional relationship" to that work. Such is not the case here. "Situs," as the Court said is an area "clearly used for loading and unloading vessels." *Northeast Marine Terminal Terminal Co. v. Caputo,* 432 U.S. 249, 281 (1977).

Such is not true here. This so-called "large maritime facility" is not an "area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 USC 902 (4) Such was the finding of the Administrative Law Judge. (54a) The injury occurred upon "an unlevel portion of ground" onto which the claimant stepped and fell to cause

his injury in an administrative area. This is a risk shared by the population at large.

The claimant had left his job site on board a carrier. He was transported by bus from the area of his work to a clerical office.

The "large maritime facility" about which the Director speaks is the Mayport Naval Station. This Court may judicially know that the Mayport Naval Station is a large naval facility constituting one of the most important carrier bases along the eastern seaboard. As such, it contains, in addition to berths for ships, single and multiple-family dwelling units, stores, schools, a golf course, clubs, police and fire departments, theatres and medical facilities. It is a city.

Persons within that area have available to them every sort of remedy; including, the Longshoremens and Harbor Workers Compensation Act, Defense Bases Act, Non-Appropriated Fund Claims Act, Florida Workmen's Compensation Act, general maritime law and the common law. Patently it is not a facility of the Jacksonville Shipyards. The Jacksonville Shipyards has an office building to house the clerical function of that company. This reservation is not an "area customarily used by [other] employer[s] in loading, unloading, repairing or building a vessel." It is a bedroom community, a recreational area, a shopping center. It is everything of a community.

But such is the Director's thrust. The Director contends that "the Mayport Naval Station had a maritime situs." The Director wishes to virtually annihilate the "situs" test. This Court recognized that "employees who perform purely clerical task" were not covered. *Northeast Marine Terminal Co. vs. Caputo,* 432 U.S. 249, 267 (1977).

The area of Perdue's injury is so far removed from the repair area that the employer provided a bus to transport persons from the office to the work site.

The Director states that the view asserted here has been the consistent view of the Department of Labor. Such is not true. In the "Guidelines for Determination of Coverage of Claims Under the Amended Longshoremens Act" which was an enclosure to LHWCA Program Memorandum No. 58, August 5, 1977, page 6. It was written

> The two criteriae, status and situs, are separate; A worker who clearly has "employee" status may not always be within the Act's coverage, as for example when he went on an errand far from any waterfront facility, and an injury which occurs at a covered shoreside location is not necessarily within the Act's coverage, as for example when the injured person's presence in the waterfront location where the injury occurred is transitory or incidental.

Earlier the Director has indicated that, in respect to ship repair, the 1972 amendments provide:

> Where the work or facility has no direct relationship to the *actual* construction, repair, or breaking of vessels, the coverage *** does *not* extend thereto.

"Coverage under the Longshoremens and Harbor Workers Compensation Act," Notice of Proposed Guidelines, 20 CFR Part 710 dated May 17, 1974.

CONCLUSION

As the Director is not affected by the order below and the employee's claim has finally been disposed of; and as this injury occurred, not at a maritime site, but within a typical

American community, distinguished only by a fence enclosure, the petition for writ of certiorari ought to be denied.

Respectfully submitted,

JOHN E. HOUSER
Attorney for Respondents